The Ohio State Technology Law Journal

"INFLUENCING" COPYRIGHT LAW: RE-EVALUATING THE RIGHTS OF PHOTOGRAPHIC SUBJECTS IN THE INSTAGRAM AGE

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In recent years, many lawsuits alleging copyright violations have been filed against celebrities who have reposted pictures of themselves taken by paparazzi on social media. As the inherent value of the photograph, which is often taken without the consent of the subject, is derived from the subject of the photograph, it is unfair for these photographic subjects to have no rights to the use of the picture, even in a limited, non-commercial context. This Note explores potential solutions to this problem and offers recommendations for copyright doctrines that could be used to give celebrities limited rights to use photographs of themselves.

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I. Introduction

Oscar Wilde reportedly once said: "The camera, you know, will never capture you. Photography, in my experience, has the miraculous power of transferring wine into water."[2] It is therefore somewhat ironic that one of the seminal cases that decided that photographs had artistic merits in the eyes of the law—and thus were worthy of copyright protection—involved a photograph of Oscar Wilde himself.[3] The case, *Burrow-Giles Lithographic Co. v. Sarony*, originated from a copyright infringement action brought by famed portrait photographer Napoleon Sarony against a lithographic company which had reproduced and sold copies of his portraits of Oscar Wilde without permission.[4] The case was important in the legal development of photography as an art, because at the time a photograph was seen as the product of a machine that made a mechanical reproduction of the scene before it—not the product of an author.[5]

The *Burrow-Giles* Court decided that the photograph in question was a work of art authored by the plaintiff, and that the creation of the portrait

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[2] Quote attributed to Oscar Wilde, QUOTEFANCY, https://quotefancy.com/quote/881699/Oscar-Wilde-The-camera-you-know-will-never-capture-you-Photography-in-my-experience-has [https://perma.cc/A93D-EQKR]. Oscar Wilde was a famed Irish poet and dramatist who lived from 1854-1900, widely known for his novel *The Picture of Dorian Gray*. Karl Beckson, *Oscar Wilde*, ENCYC. BRITANNICA (Nov. 17, 2019), https://www.britannica.com/biography/Oscar-Wilde [https://perma.cc/7FL4-BPPU].

[3] Christine Haight Farley, *The Lingering Effects of Copyright's Response to the Invention of Photography*, 65 U. PITT. L. REV. 385, 386 (2004). Oscar Wilde had a series of photographs taken shortly after his arrival in New York City for his 1882 lecture tour. John Cooper, *Sarony Photographs*, OSCAR WILDE AM., https://www.oscarwildeinamerica.org/sarony/sarony-photographs.html [https://perma.cc/2KBX-6Z7Z].

[4] 111 U.S. 53, 54 (1884). The Burrow-Giles Lithographic company reportedly produced around 85,000 copies of Sarony's portraits of Wilde. Michael North, *The Picture of Oscar Wilde*, 125 PMLA 185, 186 (2010). Some of these reproductions were on "cigar cards" that were included in cartons of cigars as a collectible item, similar to baseball cards. *Id.* at 185. Interestingly, at this early stage of Wilde's career during his lecture tour, his fame largely derived from the fact that he was widely pictured, rather than from his reputation as a speaker or author. *Id.*

[5] Farley, *supra* note 3, at 395-96. The Court in *Burrow-Giles* discussed this characterization of photography as a purely mechanical operation, stating that "it is said that . . . a photograph is the mere mechanical reproduction of the physical features or outlines of some object, animate or inanimate, and involves no originality of thought or any novelty in the intellectual operation connected with its visible reproduction in shape of a picture." *Burrow-Giles*, 111 U.S. at 58-59.

should be protected.[6] In reaching that decision, they emphasized the creative contributions of the photographer, noting that the picture was made "entirely from his own original mental conception."[7] The Court mentioned the variety of ways that the photographer contributed artistic elements to the photograph, including how he posed the subject, arranged the costume and background, and chose the lighting and shade of the photo.[8] Therefore, the work was a creative and original work of authorship that deserved copyright protection.[9]

Burrow-Giles is a crucial example of how copyright law has adapted to changing technologies. While the photograph in *Burrow-Giles* may have predated Instagram and the Kardashians by over a century, the necessity of adapting the law to confront new challenges posed by our ever-changing society is applicable in the internet age, perhaps now more than ever. The internet and social media have transformed the way we produce, consume, and distribute content, and this transformation has brought and continues to bring about unique legal challenges that require us to consider how the law can adapt to the digital age.

One way the internet has transformed the day-to-day lives of individuals and how they interact with others is through the use of social media. "Social media" refers to a wide variety of online platforms that enable users to share information, messages, and content such as pictures or videos.[10] Celebrities often use social media to build their personal

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[6] *Burrow-Giles*, 111 U.S. at 60.
[7] *Id.*
[8] *Id.*
[9] *Id.* However, this decision brought with it a demarcation between "art photography" and "ordinary photography." *See* Farley, *supra* note 3, at 431-32. The decision focused on how the photographer creates the photograph (e.g., posing of the subject), rather than an analysis of the final product. *Id.* at 432. This had the implication that some photographs that did not involve artistic choices in the arrangement of the photograph, and were just reproductions of a scene, were not protected by copyright. *Id.* at 431. Modern copyright law takes a different approach to copyright protection of photographs—almost any photograph is copyrightable, regardless of its artistic merits. *See infra* Part II.
[10] *Social Media*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/social%20media [https://perma.cc/7MXV-QHCZ]. Social media has enjoyed a meteoric rise in popularity since its inception. When the Pew Research Center began tracking social media adoption in 2005, only 5% of American adults used a social media platform. *Demographics of Social Media Users and Adoption in the United States*, PEW RSCH. CTR. (June 12, 2019), https://www.pewresearch.org/internet/fact-sheet/social-media/

following and engage with their fan base, and many of them command massive followings.[11] As one can imagine, this newfound ability to distribute content to the world at large with the tap of a finger has created many problems for creators of copyrighted works that may have their work shared online without their permission.

The law governing copyright in the United States is codified in Title 17 of the United States Code.[12] Copyright protection begins when "original works of authorship [are] fixed in any tangible medium of expression."[13] This copyright protection grants the owner of the copyright exclusive rights, including the right to authorize others to reproduce the copyrighted work, produce derivative works, distribute copies, and display the copyrighted materials publicly.[14]

One issue of copyright law that has arisen out of celebrity use of social media is when celebrities repost pictures of themselves on Instagram that were originally taken by paparazzi. Many celebrities have been sued for reposting these pictures, including Gigi Hadid, Odell Beckham

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[https://perma.cc/JAH4-SB25]. By 2011, half of American adults used some sort of social media platform, and the most recent survey, conducted in February 2019, found that number had risen to 72%. *Id.* Sixty-nine percent of American adults use Facebook, 37% use Instagram, and of those users roughly 75% of Facebook users and 60% of Instagram users visit these sites at least once a day. *Id.*

[11] *See The Most Followed Instagram Profiles*, TRACKALYTICS, https://www.trackalytics.com/the-most-followed-instagram-profiles/page/1/ [https://perma.cc/C6K3-U6CY]. As of April 2021, Cristiano Ronaldo, the internationally famous soccer star and most-followed individual on Instagram, had nearly 271 million followers on Instagram. *Id.* Many other celebrities rack up similarly large numbers of fans that follow them; at that time, Ariana Grande and Kim Kardashian West had 227 million and 210 million followers, respectively. *Id.* "Influencers" are personalities, whether A-list celebrities, D-list celebrities, famous fashion bloggers, or simply individuals with a large online following (usually on YouTube or Instagram) who use their platform to promote products to their online following. Chavie Lieber, *How and Why Do Influencers Make So Much Money? The Head of an Influencer Agency Explains*, VOX (Nov. 28, 2018, 6:00 PM), https://www.vox.com/the-goods/2018/11/28/18116875/influencer-marketing-social-media-engagement-instagram-youtube [https://perma.cc/ANZ5-JUW3].

[12] *See generally* 17 U.S.C. §§ 101-1401.

[13] 17 U.S.C. § 102(a).

[14] 17 U.S.C. § 106(a).

Junior, Kim Kardashian, and most recently Justin Bieber.[15] Almost all of these suits between the paparazzi and high-profile celebrities have ended in private settlements between the photographer and the celebrity who reposted their photo,[16] but these cases raise an important question: should the subject of a photograph possess legal rights to use the image for a non-commercial purpose? It seems patently unfair that the subjects of photographs that are taken for the most part without the consent of the subject, or at the very least with a grudging acquiescence to being photographed, would have no rights to use the photograph in a limited, non-commercial context on their social media.[17] This is especially true considering that their presence in the photograph is what gives the picture its value; a photograph of a random person walking down the street is not commercially valuable in the way a photograph of Kim Kardashian in the same situation is.

The current law surrounding the usage of these paparazzi photographs is ill-equipped to deal with these situations in an equitable manner. Part II of this Note will discuss current U.S. copyright law, and Part III will discuss the recent litigation surrounding celebrities reposting photographs of themselves. Part IV will discuss authorship rights in photographic works, including the concept of authorship as fixation and joint authorship, and Part V will offer recommendations for copyright doctrines that could be used to give celebrities rights to use photographs of themselves in a limited, non-commercial context.

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[15] Joe Price, *Justin Bieber Sued for Sharing Paparazzi Photo of Himself on Instagram*, COMPLEX (Oct. 16, 2019), https://www.complex.com/music/2019/10/justin-bieber-sued-sharing-photo-of-himself-instagram [https://perma.cc/X2D2-7VTF]; *From Gigi Hadid and Goop to Virgil Abloh and Marc Jacobs: A Running List of Paparazzi Copyright Suits*, FASHION L. (Oct. 14, 2019), https://www.thefashionlaw.com/from-bella-and-gigi-hadid-and-goop-to-virgil-abloh-and-marc-jacobs-a-running-list-of-paparazzi-copyright-suits/ [https://perma.cc/Q6HC-QDEM].

[16] FASHION L., *supra* note 15.

[17] However, some celebrities do "stage" paparazzi photos. *See* Darla Murray, *A Paparazzo Explains How Staged Celebrity Photos Really Work*, YAHOO NEWS (June 17, 2016), https://www.yahoo.com/news/paparazzo-explains-staged-celebrity-photos-172706937.html [https://perma.cc/5XPC-BQL7]. Some of these set-up photos include paid product endorsements, where the celebrity receives money for the staged photo sold by the photo agency. *Id.*

II. United States Copyright Law

The federal government's power to regulate copyrights in the United States derives from the U.S. Constitution, which states that: "The Congress shall have Power . . . To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."[18] Federal copyright law is largely governed by the 1976 Copyright Act.[19] Copyright protection is designed to "secure a fair return for an 'author's' creative labor."[20] Copyright protection can be granted to works that meet three criteria: (1) originality, (2) work of authorship, and (3) fixation in a tangible medium of expression.[21]

The first requirement for copyright protection, originality, has a very low bar regarding what constitutes an original work. Originality, as it is used in copyright, means only that the work was created independently

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[18] U.S. CONST. art. I, § 8, cl. 8. The direct source of the ideas in the copyright clause was the Statute of Anne of 1709, the English copyright statute that was the origin of the statutory copyright. L. Ray Patterson, *Understanding the Copyright Clause*, 47 J. COPYRIGHT SOC'Y U.S.A. 365, 374 (2000). The language in the copyright clause of the Constitution closely tracks the language found in the title of the Statute of Anne, which read: "An act for the encouragement of learning, by vesting the copies of printed books in the authors or purchasers of such copies, during the times therein mentioned." *Id.* at 374-75.

[19] *See generally* 17 U.S.C. §§ 101-1401. In referring to "copyright law," this Note discusses copyright law solely in the context of U.S. Federal Copyright laws. State copyright laws do exist, and a space is carved out for them in Section 301 of the 1976 Copyright Act. 17 U.S.C. § 301. However, these state copyright laws are largely constrained and preempted by federal law. *See* Marketa Trimble, *U.S. State Copyright Laws: Challenge and Potential*, 20 STAN. TECH. L. REV. 66, 73 (2017). Copyrightable works normally cannot be protected by states unless the state law right differs significantly from copyright. Mark A. Lemley, *Beyond Preemption: The Law and Policy of Intellectual Property Licensing*, 87 CALIF. L. REV. 111, 140 (1999). State laws that apply to subject matter outside the scope of copyright as specified in 17 U.S.C. § 106 or state laws with respect to "subject matter that does not come within the subject matter of copyright," as specified by 17 U.S.C. § 102 or 17 U.S.C. § 103, are among the few exceptions to the general preemption of state copyright law by federal copyright law. 17 U.S.C. § 301. As this Note deals only with copyrighted works that fall squarely within the domain of copyright that is exclusively reserved for the Federal Government, state copyright law is not at issue and will not be discussed.

[20] Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 432 (1984). The Supreme Court in *Sony Corp* explained that the ultimate purpose of copyright protection is to "stimulate artistic protection for the public good," and that the task of protecting intellectual property involved a balance of protecting the interests of authors and inventors and society's competing interest in the "free flow of ideas, information, and commerce." *Id.* at 430, 432.

[21] 17 U.S.C. § 102(a).

by the author and that it possesses "some minimal degree of creativity."[22] The Copyright Act specifies eight categories that can be works of authorship, including literary works, musical works, dramatic works, pantomimes and choreographic works, pictorial, graphic, and sculptural works, motion pictures and other audiovisual works, sound records, and architectural works.[23] Photographs fall under the category of "pictorial, graphic, and sculptural works."[24] A work is considered "fixed" when "its embodiment in a copy . . . is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration."[25]

Copyright protection for works created on or after January 1, 1978 generally subsists from the date of the creation of the work and lasts for a term consisting of the life of the author and seventy years after the author's death.[26] Subject to a few exceptions, the Copyright Act gives exclusive rights to the owner of a copyright to use and authorize the use of their work in six ways. 17 U.S.C. § 106 states that:

> [T]he owner of a copyright . . . has the exclusive rights to do and to authorize any of the following:
> (1) to reproduce the copyrighted work in copies or phonorecords;
> (2) to prepare derivative works based upon the copyrighted work;

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[22] Feist Publ'n's, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 345 (1991) ("[T]he requisite level of creativity is extremely low; even a small amount will suffice. The vast majority of works make the grade quite easily, as they possess some creative spark, 'no matter how crude, humble or obvious' it might be."). Unlike patentable works, a work that is the subject of copyright need not be novel. *See* Steven Boyd, *Deriving Originality in Derivative Works: Considering the Quantum of Originality Needed to Obtain Copyright Protection in a Derivative Work*, 40 SANTA CLARA L. REV. 325, 334 (2000). An author can receive copyright protection for an original work even if an identical work exists, as long as the author did not copy it from the prior identical work. *See* Sheldon v. Metro-Goldwyn Pictures Corporation, 81 F.2d 49, 54 (2d Cir. 1936) ("[B]y if some magic a man who had never known it were to compose anew Keats's Ode on a Grecian Urn, he would be an 'author,' and, if he copyrighted it, others might not copy that poem, though they might of course copy Keats's.").
[23] *Sheldon*, 81 F.2d at 54.
[24] 17 U.S.C. § 101.
[25] *Id.*
[26] 17 U.S.C. § 302(a). This protection also applies to joint works and lasts until 70 years after the last surviving author's death. 17 U.S.C. § 302(b).

> (3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;
> (4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly;
> (5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly; and
> (6) in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.[27]

However, these protections do not give a copyright holder complete control over how a work can be used. Use of a work (for example, reading a book or privately displaying or performing a work) is not included in the exclusive rights granted to a copyright holder.[28] The Copyright Act outlines multiple other limitations on exclusive rights, including the doctrine of "fair use," which provides for use in certain cases without the permission of the copyright holder.[29]

The Copyright Act also provides remedies for infringement of copyright. Anyone who violates any of the previously mentioned exclusive rights of an author is liable for infringement of copyright.[30] Remedies for copyright infringement include injunctions, impoundment and disposal of infringing articles, damages, and in some cases criminal penalties.[31] An infringer of a copyright is liable either for the copyright

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[27] 17 U.S.C. § 106.
[28] Christina Mulligan, *Copyright Without Copying*, 27 CORNELL J.L. & PUB. POL'Y 469, 471 (2017).
[29] *See generally* 17 U.S.C. §§ 107-22.
[30] 17 U.S.C. § 501(a).
[31] 17 U.S.C. §§ 502-06. The majority of copyright infringement is dealt with in civil courts. Serge Subach, *Criminal Copyright Infringement: Improper Punishments from an Improper Analogy to Theft*, 40 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 255 (2014). Criminal liability for copyright infringement exists when a valid copyright is infringed, the infringement

owner's actual damages and any profits made by the infringer, or for statutory damages.[32]

As one can imagine, the technological developments of the forty-plus years since the enactment of the Copyright Act of 1976 have necessitated additional legislation in the area of copyright law. In 1998, Congress enacted the Digital Millennium Copyright Act ("DMCA") to "facilitate the robust development and world-wide expansion of electronic commerce, communications, research, development, and education in the digital age," and also to implement two international intellectual property treaties.[33] The Senate report accompanying the bill acknowledged the constant evolution of technology and the necessary accompanying evolution of the law.[34] The DMCA added sections to the Copyright Act that addressed the circumvention of digital copyright protection, and limited liability for internet service providers.[35] This limitation of liability for service providers is important because it prevents sites that host user-uploaded content from being secondarily liable if their users upload any potentially infringing content.[36] For example, if someone uploads copyrighted material to YouTube, YouTube is not necessarily liable if they did not have actual knowledge or were not aware of the uploaded infringing material.[37]

As copyright law has changed and adapted to modern technologies, previously held beliefs and doctrines of copyright law have been challenged. One area of the law that has received attention is the concept

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is willful, and the infringement is either undertaken for commercial advantage or financial gain, or the defendant reproduced or distributed one or more copies of copyrighted works totaling over $1,000 at retail over a 180-day period, or a defendant distributed a work being prepared for commercial distribution where he knew or should have known the work was intended for commercial distribution. *Id.* at 260.

[32] 17 U.S.C. § 504(a).

[33] S. REP. NO. 105-190, at 2 (1998).

[34] *Id.* The Senate noted the "ease with which digital works can be copied and distributed worldwide virtually instantaneously," and the potential this had to make copyright owners hesitant to make their work readily available on the internet. *Id.* at 8.

[35] 17 U.S.C. § 512.

[36] *See id.*

[37] *See* Viacom Int'l, Inc. v. YouTube, Inc., 676 F.3d 19 (2d Cir. 2012) (owners of copyrighted videos filed an infringement action against YouTube, alleging direct and secondary copyright infringement due to video clips that were uploaded to YouTube).

of authorship rights in copyright law.[38] As the means of publishing, distributing, and collaborating on works of art has evolved, some of the previously held doctrines regarding authorship have as well, and there is potential for them to evolve further.[39]

III. Lawsuits Brought Against Celebrities by Paparazzi

A veritable slew of copyright infringement lawsuits have been filed against celebrities in recent years for reposting photographs of themselves, taken by paparazzi, on their Instagram accounts.[40] This star-studded list of alleged copyright infringers includes Nicki Minaj, Justin Bieber, the Kardashians,[41] Ariana Grande, Jessica Simpson, Odell Beckham Jr., and others.[42] One of these lawsuits was filed in January

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[38] *See, e.g.*, Margot E. Kaminski & Guy A. Rub, *Copyright's Framing Problem*, 64 UCLA L. REV. 1102, 1125-28 (2017).

[39] *As the Number of Paparazzi v. Celebrity Copyright Cases Grows, How Big of a Problem Is This Really?*, FASHION L. (July 15, 2019), https://www.thefashionlaw.com/home/as-the-number-of-paparazzi-v-celebrity-copyright-cases-continues-to-grow-how-big-of-a-problem-is-this-really [https://perma.cc/LRE7-7MLC] (stating that Nicki Minaj, Gigi Hadid, Khloe Kardashian, Ariana Grande, Jessica Simpson, and also brands such as Christian Siriano, Versace, and Marc Jacobs have been sued for reposting photographs originally taken by paparazzi on their Instagram accounts).

[40] *See id.*

[41] Kim Kardashian has confronted this problem by hiring her own photographer to take her social media pictures. Ellie Woodward, *Kim Kardashian Has Hired a Personal Photographer So Fans Can Repost Her Pics*, BUZZFEED (Feb. 7, 2019), https://www.buzzfeed.com/elliewoodward/kim-kardashian-personal-paparazzo-fans-post-pics [https://perma.cc/45ZJ-UFBJ]. She did this to avoid liability to herself, but also so that her fans could repost pictures from her Instagram account without worrying about their accounts being taken down for copyright infringement. *Id.*

[42] Odell Beckham Jr., the NFL wide receiver, was sued for reposting a photograph of himself. *Lawsuits over Paparazzi Images on Instagram Raise Celebrity Questions over Right of Publicity*, FASHION L. (Oct. 19, 2018), https://www.thefashionlaw.com/lawsuits-over-instagram-images-raise-celebrity-questions-over-right-of-publicity/ [https://perma.cc/68KU-NH4R]. Beckham took a distinctly different approach than other celebrities had in responding to these lawsuits and went on the offensive. *See* Eriq Gardner, *NFL Star Alleges in Lawsuit That Paparazzi Agency Is Extorting Him and Other Celebrities*, HOLLYWOOD REP. (Feb. 1, 2018, 3:25 PM), https://www.hollywoodreporter.com/thr-esq/nfl-star-alleges-lawsuit-paparazzi-agency-is-extorting-him-celebrities-1081084 [https://perma.cc/LR7S-9WR5]. He in turn filed a lawsuit of his own seeking declaratory relief, claiming that Splash News and Picture Agency engaged in a "pervasive and coercive practice of photographing celebrities without their knowledge, selling those celebrity photographs to gossip websites and publications for profit, and then demanding payment from the celebrity for purported copyright infringement." *Id.* This lawsuit was later dropped. *NFL Star Odell Beckham Jr. Drops Paparazzi Extortion Lawsuit*, BLAST (last updated June 10, 2019, 10:48 PM),

2019 against Jelena Noura Hadid (commonly known as "Gigi Hadid"), an internationally famous supermodel.[43] Hadid was photographed on October 11, 2018 in New York City by a paparazzo.[44] The photograph in question pictured Hadid in front of a building at the bottom of what appears to be the ramp of a loading dock, wearing a denim jacket and shorts.[45] In the photograph, Hadid had turned to smile at the camera, posing with her hand under her chin.[46] Hadid uploaded a cropped version of the photograph to her personal Instagram account on October 12, 2018, which was followed by more than forty-three million individuals at the time.[47] Xclusive-Lee filed suit against Hadid on January 28, 2019, alleging direct copyright infringement by Hadid as well as contributory infringement.[48] The lawsuit was eventually dismissed on July 18, 2019 because Xclusive-Lee failed to allege that it held a registered copyright in the photo at the time it filed the lawsuit.[49]

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https://theblast.com/c/odell-beckham-drops-paparazzi-extortion-lawsuit [https://perma.cc/9EQT-93VN].

[43] Ashley Carman, *Gigi Hadid Wants to Rewrite Copyright Law Around Her Instagram Account*, VERGE (June 24, 2019, 5:50 PM), https://www.theverge.com/2019/6/24/18715675/gigi-hadid-copyright-instagram-lawsuit-paparazzi [https://web.archive.org/web/20190625004616/https://www.theverge.com/2019/6/24/18715675/gigi-hadid-copyright-instagram-lawsuit-paparazzi]. Gigi Hadid has been sued a total of three times for reposting paparazzi photographs on her Instagram account, in September 2017 and January 2019 for posting photographs of herself, and in September 2019 for posting a picture of her former boyfriend Zayn Malik. *Gigi Hadid is Being Sued for a Third Time for Posting Another's Photo on Her Instagram*, FASHION L. (Sept. 13, 2019), https://www.thefashionlaw.com/home/gigi-hadid-is-being-sued-for-a-third-time-for-posting-anothers-photo-on-her-instagram [https://perma.cc/EA4Y-7H45]. The September 2017 and September 2019 suits were settled out of court. *Id.*

[44] Complaint at 3, Xclusive-Lee v. Hadid, 2019 WL 3281013 (E.D.N.Y. July 18, 2019) (No. 19-CV-520).

[45] *Id.* at Exhibit 4.

[46] *Id.*

[47] *Id.* Hadid claimed in an Instagram post, published after she had been notified of the lawsuit by her management, of an image of several paragraphs of text decrying the habits of the paparazzi industry, that she had found the photograph on Twitter with no photographer's name on the image, and that she would have given the photographer credit if she had known "which of the 15+ photographers outside that day took these exact photos." Gigi Hadid (@gigihadid), INSTAGRAM, https://www.instagram.com/p/BpF_uK_nivH/ (last visited Jan. 25, 2020).

[48] Complaint, *supra* note 44, at 5-6. Xclusive-Lee based their claim for contributory infringement on the basis that she allegedly made the photograph available to "innumerable individuals and media outlets." *Id.*

[49] Alexis Kramer, *Gigi Hadid Escapes Copyright Suit over Instagram Photo*, BLOOMBERG (July 19, 2019, 12:35 PM), https://news.bloomberglaw.com/bloomberg-law-news/gigi-hadid-

However, the briefs filed in the case raise some interesting issues regarding the rights of the subject of a photograph.[50]

In Hadid's Memorandum of Law in Support of her Motion to Dismiss, besides raising the ultimate issue that resulted in dismissal of the case (Xclusive-Lee's failure to allege that they had registered the copyright in the Complaint), Hadid also raised several other defenses to claim that her use of the photograph was permissible.[51] Hadid claimed that her use of the photograph was permissible under the fair use doctrine and that she had an implied license for the use of the photograph.[52]

Xclusive-Lee then argued, inter alia, that Hadid's argument for fair use was invalid on the basis that the use of the photograph was not transformative, and that she benefited commercially from the use of the photo on her Instagram page, because she "maintains and supports her brand by chronicling her exploits on social media, including Instagram."[53] However, as observed by one commentator, this argument raises another question—if everything a model does is inherently commercial, is the photographer unjustly enriched when he takes and sells her picture?[54]

When this issue is distilled down to its essence, its unfairness is clear. Paparazzi make profits from the images they take solely because they contain a famous individual. A paparazzo profiting off of such a picture, either taken non-consensually, as in the case of Odell Beckham Jr., or

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escapes-copyright-suit-over-instagram-photo. Xclusive-Lee had only applied for a copyright for the photograph at the time it filed the suit. *Id.* The court pointed to the Supreme Court's decision in *Fourth Estate Pub. Benefit Corp. v. Wall Street.com LLC*, where the court held that a copyright holder cannot sue for infringement until the Copyright Office has registered the work. *Id.*

[50] *Id.*

[51] *See* Memorandum of Law in Support of Defendant's Motion to Dismiss at 4-15, Xclusive-Lee v. Hadid, 2019 WL 3281013 (E.D.N.Y. July 18, 2019) (No. 19-CV-520).

[52] *Id.* at 7.

[53] *See* Plaintiff's Opposition and Accompanying Memorandum of Law to Defendant's Motion to Dismiss at 1-2, 3-4, Xclusive-Lee v. Hadid, 2019 WL 3281013 (E.D.N.Y. July 18, 2019) (No. 19-CV-520).

[54] Joe Patrice, *Gigi Hadid Wants to Change Copyright Law and She Has a Point*, ABOVE THE L. (June 25, 2019, 4:45 PM), https://abovethelaw.com/2019/06/gigi-hadid-wants-to-change-copyright-law-and-she-has-a-point/.

consensually, as in the case of Gigi Hadid, without the individual from whom the picture derives its value having even limited, non-commercial rights to the use of that photograph is not an equitable situation.[55] However, there are several legal theories that could potentially grant the subjects of these photographs rights to their use.

IV. Authorship Rights in Photographs

One interesting omission from the list of definitions present in the Copyright Act is that it does not define the words "author" or "authorship."[56] The Copyright Act provides a list of works of "authorship," but does not define the concept of who or what the "author" is.[57] Despite the statute's silence, general presumptions about the concept of authorship do exist.[58] Generally, it is presumed that the "author" of a work is the person who controls the fixation of the work in a tangible medium, such as the director behind a video camera or the photographer who takes a photograph.[59] However, it has been argued that a strict construction of authorship as fixation can ignore creative contributions others make to the work—the person in front of the camera can make creative contributions as well.[60]

In the distant past, fixation presented fewer issues than it does today. Copyright protections as they were originally created in the United States, well before the age of photography as an artistic medium, were

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[55] There have also been many lawsuits against brands that have reposted paparazzi photographs to their pages. *See* FASHION L., *supra* note 15. However, these lawsuits are distinctly different from the lawsuits against celebrities sued for posting pictures of themselves. It is difficult to imagine that a brand posting a picture of someone famous utilizing their products on the brands official Instagram page could be construed as anything but a commercial use, and this would weigh very heavily against the brand re-using the photograph. *See infra* Part V.C.1 for a discussion of how the purpose and character of the use factors into a fair use analysis, including whether the work is of a commercial nature.

[56] Aalmuhammed v. Lee, 202 F.3d 1227, 1231 (9th Cir. 2000) (noting that the Copyright Act does not define "author," but it does define "joint work").

[57] 17 U.S.C. § 102.

[58] John Tehranian, *Sex, Drones & Videotape: Rethinking Copyright's Authorship-Fixation Conflation in the Age of Performance*, 68 HASTINGS L.J. 1319, 1321-22 (2017).

[59] *Id.* at 1322.

[60] *See* Justin Hughes, *Actors as Authors in American Copyright Law*, 51 CONN. L. REV. 1, 51 (2019) (arguing that without a contractual agreement stating otherwise, an actor in a dramatic performance could be granted joint authorship rights for their contribution to a work).

extended to a limited set of media, of which fixation was "an undifferentiated part of the authorship process."[61] In the past, the individual who fixed the copyrightable work in a tangible medium was also the one who provided the ideas for the work.[62] The concept of the person who provides the creative ingenuity and the person who "fixes" the work in a tangible medium being one and the same has been referred to as the "creation-fixation convergence."[63]

Works can have more than one author. The Copyright Act defines a "joint work" as "a work prepared by two or more authors with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole."[64] Joint authorship (without an agreement to the contrary) gives joint authors an equal right to the profits and equal right to exploit the work, even if the authors did not contribute to the work equally.[65] There are several different tests for joint authorship that have been proposed.[66] A test proposed by Professor Melville Nimmer says that to have joint authorship rights, the contribution must be more than de minimis, even though it might not be independently copyrightable.[67] However, this test has faced criticism for that it may afford joint authorship rights to too many contributors.[68] Another test, one which has been traditionally favored by courts, is a test proposed by Professor Paul Goldstein, under which each author is

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[61] Evan Brown, *Fixed Perspectives: The Evolving Contours of the Fixation Requirement in Copyright Law*, 10 WASH. J.L. TECH. & ARTS 17, 20 (2014). The first Copyright Act, which was enacted in 1790, only applied to maps, charts, and books. *Id*. at 21. Congress later expanded this protection to musical compositions in 1831, and in 1909 expanded the protections to include "periodicals, prepared speeches, dramatic compositions, drawings, prints, photographs, and 'works of art.'" *Id.* at 22. Today, what can be protected by copyright is much more expansive, as copyright protection is not confined to the categories enumerated in the current Copyright Act. *Id.*

[62] Tehranian, *supra* note 58, at 1322.

[63] *See id*. at 1321-22.

[64] 17 U.S.C. § 101.

[65] Mary LaFrance, *Authorship, Dominance, and the Captive Collaborator: Preserving the Rights of Joint Authors*, 50 EMORY L.J. 193, 193 (2001).

[66] *See id.* at 195-200 (explaining various manners in which courts have evaluated joint authorship claims).

[67] *Id.* at 196.

[68] *Id.* at 197.

required to make a contribution that would be independently copyrightable.[69]

With the expansion of copyright protections into other forms of media, such as movies, music, and other forms of digital art, what was initially a convergence has now become a significant gap between the creatives who may contribute to a work and the person who actually "fixes it in a tangible medium."[70] Many different individuals may contribute in a creative fashion to a work, especially in the massive modern media industry. For example, a 2017 study showed that it now takes an average of 4.53 writers to create a hit single, and only four out of the one hundred songs analyzed were credited to a single writer.[71] This is an increase from even ten years prior, where the average number of writers on a top 100 single was 3.52, and fourteen of the songs were credited to one person.[72] This change has been attributed to changes in the music industry stemming from a desire by record-labels to speed up the process of song creation.[73]

The above-referenced study only included the number of people credited in actually writing the song. However, one can imagine that many more people contributed to the creative process in various manners. For example, the way a musician decides to phrase a certain musical part and the choices that audio engineers make during post-processing of the tracks recorded in the studio are all part of the final product that makes it onto the master record and eventually to listeners' ears.

One related area that has been explored, and which is even more complex with regard to the multitudes of people involved in production of a work, is the role of actors in their performances, and whether that entitles them to authorship rights in the work. The contributions of those

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[69] *Id.* at 196.
[70] *See* Tehranian, *supra* note 58, at 1322-23.
[71] Mark Savage, *How Many People Does It Take to Write a Hit Song?*, BBC NEWS (May 16, 2017), https://www.bbc.com/news/entertainment-arts-39934986 [https://perma.cc/2D39-EUEQ] (reporting on a study by Music Week magazine that analyzed the 100 most popular singles of 2016).
[72] *Id.*
[73] *Id.*

who work together in the production of a film are typically governed by legal mechanisms that give the rights and permissions in a film to the producer of the film.[74] In a situation where these rights stipulated by contract do not exist, it has been proposed that actors should possibly have joint authorship rights due to their contribution via their creative performances.[75]

However, this view has generally not been adopted by courts.[76] *Garcia v. Google*, a 2015 case in the Ninth Circuit, was one such case that raised the issue of whether a contributor to an integrated work, such as a film, has an independent copyright in their contribution.[77] The actress who brought the suit initially responded to a casting call for a film entitled *Desert Warrior*, which was an action-adventure film set in ancient Arabia.[78] She was cast in a cameo role, in which she spoke two sentences.[79] Garcia only worked for a very short period of time on the film, and the director of the film did not obtain a written agreement that assigned the rights of her creative contribution to the film to the moviemaker.[80]

However, the writer-director of the film had very different intentions from what the film was originally represented to be.[81] The film that was actually produced was an anti-Islamic film that depicted the Prophet

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[74] *See* Hughes, *supra* note 60, at 51 (explaining that audiovisual performances are almost always subject to contractual regulations, as generally in film production everyone involved in the production works for hire).
[75] *Id.* at 68.
[76] *See, e.g.*, Garcia v. Google, Inc., 786 F.3d 733, 737 (9th Cir. 2015).
[77] Diana C. Obradovich, Garcia v. Google*: Authorship in Copyright*, 31 BERKELEY TECH. L.J. 785, 794 (2016).
[78] *Garcia*, 786 F.3d at 737.
[79] *Id.*
[80] Garcia v. Google, Inc., 743 F.3d 1258, 1265 (9th Cir.), *opinion amended by* 766 F.3d 929 (9th Cir. 2014), *rev'd en banc*, 786 F.3d 733 (9th Cir. 2015).
[81] *Garcia*, 786 F.3d at 737. The filmmaker, Mark Basseley Youssef, who also went by the name "Sam Basile," was later sentenced to a year in prison for violating the terms of his release from a 2010 conviction of bank and credit-card fraud. Victoria Kim, *'Innocence of Muslims' Filmmaker Gets a Year in Prison*, L.A. TIMES: L.A. NOW (Nov. 7, 2012, 3:00 PM), https://latimesblogs.latimes.com/lanow/2012/11/innocence-muslims-filmmaker-sentenced.html [https://perma.cc/6C49-C9K2]. Some of the initial charges that led to the sentence were related to the film, including that he had lied about his role in the film, but these charges were dropped in exchange for admitting to four other violations, including lying to his probation officer and using bogus names. *Id.*

Mohammed as a murderer, pedophile, and homosexual.[82] Garcia's original lines were dubbed over and in her five-second cameo, she appeared to say "Is your Mohammed a child molester?" instead.[83] A trailer for the film was uploaded to YouTube, the video-sharing website owned by Google.[84] As a result of the release of this inflammatory trailer, Garcia received multiple death threats due to her role in the film.[85]

Garcia then asked Google to remove the film from YouTube, claiming it was hate speech and violated her state law rights to privacy and to control her likeness.[86] She also sent Google five takedown notices pursuant to the Digital Millennium Copyright Act, 17 U.S.C. § 512, claiming that YouTube's broadcast of the trailer infringed her copyright in her "audio-visual dramatic performance."[87] Google declined to remove the film, and Garcia subsequently filed suit in the United States District Court for the Central District of California, naming Google and Youssef, the director, as codefendants.[88] She alleged copyright infringement against both defendants, as well as several state law tort claims against the director.[89]

The district court initially denied Garcia's motion for a preliminary injunction on the copyright claim to remove the video, which was then reversed by a divided Ninth Circuit panel and the film was ordered removed from YouTube.[90] The Ninth Circuit then granted a rehearing en banc in 2015.[91] The court analyzed the merits of the preliminary

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[82] *Garcia*, 786 F.3d at 737.
[83] *Id.*
[84] *Id.* This film was linked to numerous violent protests in the Middle East, and was a purported motivation of the infamous September 11, 2012 attack on the United States Consulate in Benghazi, Libya. *Id.* at 738. Shortly after this Benghazi attack, an Egyptian cleric issued a fatwa against anyone associated with the film, which called upon the "Muslim Youth in America[] and Europe" to "kill the director, the producer[,] and the actors and everyone who helped and promoted this film." *Id.*
[85] *Id.*
[86] *Id.* at 738.
[87] *Id.*
[88] *Id.*
[89] *Id.*
[90] *Id.* at 738-39.
[91] *Id.* at 739.

injunction under the four-factor test in *Winter v. NRDC*, and found that the district court did not abuse its discretion in denying Garcia's request for a preliminary injunction because she could not show that the "law and facts clearly favor her position."[92] The Ninth Circuit found Garcia's copyright claim unpersuasive, as the district court's finding that Garcia granted Youssef an implied license to use her performance was not "clearly erroneous," and because Garcia could not argue that the fixation of her performance was by Youssef and the filming crew, and because she did not authorize the fixation.[93] The Ninth Circuit also agreed with Google's proposition that giving copyright protections to those who contribute to individual parts of a movie would "make Swiss cheese of copyrights," as treating every acting performance as an independent work would be a logistical nightmare.[94] Garcia chose not to appeal, and dismissed the case.[95]

Garcia further reinforced the proposition that authorship rights vest in those who control the fixation the work. However, a strict adherence to this authorship-as-fixation doctrine can ignore creative contributions that exist in front of the camera.[96] A highly unique example of a case where the authorship-as-fixation doctrine does not necessarily apply is *Naruto v. Slater*, where an animal rights organization brought suit, allegedly on behalf of a monkey, against a wildlife photographer for publishing photographs that the monkey had taken of himself using the photographer's camera.[97] The suit was unsurprisingly dismissed, as the court found that the monkey lacked statutory standing to sue under the Copyright Act.[98] While the ultimate decision in this case rested on the fact that the monkey was not a human, it does raise interesting questions about the ownership of image copyrights.[99] If the wildlife photographer, who was the creative force behind the production of the work, was not

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[92] *Id.* at 739.
[93] *Id.* at 743-44.
[94] *Id.* at 742-43.
[95] Obradovich, *supra* note 77, at 804.
[96] Tehranian, *supra* note 58, at 1348 (noting that "it is not uncommon for the person in front of the camera to contribute far more, creatively speaking, to the ultimate expressive work captured in a tangible medium than the person behind the camera.").
[97] *See generally* Naruto v. Slater, 888 F.3d 418 (9th Cir. 2018).
[98] *Id.*
[99] *See* Tehranian, *supra* note 58, at 1355-58.

the one who "fixed the work in a tangible medium," and the monkey, as a non-human, cannot possess copyright interests, who has the rights to the image?[100] The logical conclusion is obviously that the wildlife photographer, who was responsible for the production of the work, should have the rights to profit from the photograph if he so desires, but under a strict reading of the authorship-as-fixation doctrine he would not.[101]

This reconsideration of the authorship-as-fixation doctrine has some relevance to the world of paparazzi photography. Some photographs captured by paparazzi inarguably do not contain any creative effort on the part of the subject, for example if Brad Pitt was photographed leaving a restaurant. A different argument could be raised if the subject of the photo contributed in a fashion—for example by posing in a certain manner or choosing an outfit.[102] While it is an unfair comparison (despite what some celebrities may say) to compare paparazzi photographers to monkeys simply pressing a shutter button, it could absolutely be argued that the subject still does contribute to the final creative work and should have a right, albeit a limited one, to its use.

V. Doctrines that Could Give the Subject of a Photograph Rights to the Photo

There are several legal doctrines that could potentially grant the subject of a photograph rights to its use.[103] First, the doctrine of joint authorship has some potential to give the subject of a photograph rights to its use. However, giving "joint authorship" rights to the subject of a photograph would likely face similar problems as giving actors joint authorship. The optimal solution to grant rights to the subject of a photograph lies in the

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[100] *Id.* at 1357-58.
[101] *See id.* at 1357.
[102] *See* Memorandum of Law in Support of Defendant's Motion to Dismiss, *supra* note 51, at 10.
[103] For the purposes of this Note, the discussion of a reposted photograph will refer to a paparazzi photograph that is reposted by the subject of that photograph with minimal editing or cropping, such as the photograph at issue in *Xclusive-Lee*.

doctrine of fair use, or possibly an implied license for the use of the photograph.[104]

A. Joint Authorship

One possible legal framework that could give the subject of a photograph rights to the work is joint authorship.[105] However, this approach would be difficult to implement under existing legal doctrine. It could be argued that the subject of a photo can contribute creative elements to the photograph. In the case discussed above, *Xclusive-Lee v. Hadid*, Hadid argued in the Memorandum of Law in Support of her Motion to Dismiss that she contributed creative elements to the photograph through her chosen pose and her clothing choices.[106] Even though Hadid was not making an argument that she was a joint author of the photograph, her contribution of these "creative elements" could be the basis for a joint authorship claim.

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[104] It would be remiss not to mention the right of publicity, which is grounded in state law and protects the right of individuals to control commercial exploitations of their names, likenesses, and identities. *See* Rebecca Tushnet, *A Mask That Eats into the Face: Images and the Right of Publicity*, 38 COLUM. J.L. & ARTS 157, 158 (2015). The right of publicity does not generally prohibit the use of a likeness in a context that is considered "newsworthy," but that has not stopped celebrities from attempting to assert right of publicity claims in response to paparazzi photography. *See* FASHION L., *supra* note 42. However, a full analysis of this issue is outside the scope of this Note.

[105] *See* Part V.A, *supra* (discussing joint authorship rights).

[106] *See* Memorandum of Law in Support of Defendant's Motion to Dismiss, *supra* note 51, at 10. However, Hadid was not making a case for joint authorship; rather she was arguing that the second factor of fair use should weigh in her favor. *Id.* at 7; *see also* Reply Memorandum of Law in Support of Defendant's Motion to Dismiss at 6, Xclusive-Lee v. Hadid, 2019 WL 3281013 (E.D.N.Y. July 18, 2019) (No. 19-CV-520). Xclusive-Lee in their memorandum in opposition to Hadid's motion to dismiss, as well as many of the media outlets who covered the lawsuit, glossed over or otherwise failed to understand this important distinction between a claim of fair use and a claim of joint authorship. *See* Plaintiff's Opposition and Accompanying Memorandum of Law to Defendant's Motion to Dismiss, *supra* note 53, at 7 ("Hadid's assertion that she somehow maintains joint copyright in the Photograph . . . is preposterous"); Carman, *supra* note 43 ("Hadid believes . . . her participation in photos—from posing to choosing her outfit—invalidates a photographer's ownership claims."); *Photo Co. Suing Gigi Hadid Says Co-Authorship Claim is "Preposterous," Implied License is a "Blatant Attempt to Rewrite the Law"*, FASHION L. (June 13, 2019), https://www.thefashionlaw.com/home/photo-agency-suing-gigi-hadid-says-co-authorship-claim-is-preposterous-implied-license-is-a-blatant-attempt-to-rewrite-the-law [https://perma.cc/FD28-PUXW] ("Xclusive takes issue with Hadid's argument that . . . [she] should be considered an "author" of the photo, which would give her rights in it.").

The difficulty with this approach is that it would likely run into the same roadblocks that frustrate actors who attempt to argue for joint authorship rights. Consider the issue of fixation presented in *Garcia*.[107] A celebrity photographed by a paparazzo plays no role in the actual fixation of the photographs even if they could possibly make the argument that they contributed creative elements of the photograph through their pose, clothing, etc. Also, under the Goldenstein test for joint authorship that is favored by courts, the joint author must make a contribution that is independently copyrightable.[108] It would be impossible for the aforementioned "creative elements" to be independently copyrightable, as posing in a denim jacket and smiling would not be itself fixed in a tangible medium and would therefore not be copyrightable.[109]

The implementation of joint authorship rights would also be a potential logistical nightmare. Like Google contended in *Garcia v. Google*, it would have the potential "to make Swiss cheese out of copyright law."[110] Since a joint author is entitled to a share of the profits from a work, celebrities who attained "joint author" status with respect to a photograph would theoretically be entitled to a share of the paparazzo's profits from the sale of the picture.[111] Establishing a joint-authorship doctrine for the subjects of paparazzi photos has the potential to tip the scales in favor of the subject of the photograph to an inequitable degree.

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[107] *See* Part IV, *supra* (discussing *Garcia*).

[108] LaFrance, *supra* note 65, 65at 196 (stating the Goldenstein test). With regard to specific poses, the Ninth Circuit has held that yoga poses are not entitled to copyright protection, so it is highly doubtful that a chosen celebrity pose would qualify. *See Bikram's Yoga Coll. Of India, L.P. v. Evolation Yoga, LLC.*, 803 F.3d 1032, 1044 (9th Cir. 2015).

[109] *See* discussion of joint authorship, *supra* Part V.A. While some courts look favorably upon the authorship test proposed by Melville Nimmer, that a joint author's contribution simply must be more than de minimis, the majority express concern that it would give joint authorship to too many contributors. *Id.* Application of a joint authorship to the situation of paparazzi photos also runs into a problem with the issue of intent. The Second Circuit held in *Childress v. Taylor* that the co-authors "entertain in their minds the concept of joint authorship." 945 F.2d 500, 508 (2d Cir. 1991). This intent requirement of the joint authorship test would severely limit the scope in which this doctrine could be applied to photographs, because even assuming the "creative contribution" made by the subject of a photograph satisfied the requirements for joint authorship, the subject would have to prove that they intended it to be part of the final work.

[110] Garcia v. Google, Inc., 786 F.3d 733, 742 (9th Cir. 2015).

[111] *See Childress*, 945 F.2d at 508.

Additionally, this doctrine could only potentially apply to a subset of photos where the subject contributed in a creative manner and had the intent to do so. A photo similar to the one that was the subject of the lawsuit against Gigi Hadid, where she deliberately posed, may have some creative contributions, but a candid photograph of Jennifer Aniston at the grocery store, for example, would not have any potential footing under this theory, as joint authors must have the intent to combine their contributions into a joint work.[112] As a theory of joint authorship would have the potential to shift the balance of rights in an opposite, but also inequitable, direction, and because it has limited applicability, it is likely not a tenable solution to this issue.

B. Unjust Enrichment

Another potential doctrine that could give celebrities to right to repost photographs is a contract implied-in-law. A contract implied-in-law is a legal fiction used to achieve justice where no actual contract exists.[113] It does not require an actual agreement or meeting of the minds, and does not require assent by either of the parties, and can be implied from the conduct of the parties.[114] The theory of an implied-in-law contract is one that is based on equity, and that one party should not be unjustly enriched due to the contributions of another.[115]

This theory has not been argued thus far by an accused infringer to prevent a plaintiff from claiming exclusive rights in a work.[116] However,

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[112] *Id.*

[113] RESTATEMENT (SECOND) OF CONTRACTS § 4 cmt. b (AM. L. INST. 1987). Unlike true contracts, quasi-contracts are not based on the intention of the parties to undertake the performances in question, and they are not promises. At common law, these obligations were ordinarily enforced in the same sort of action that was appropriate to true contracts, so this has caused confusion with reference to the nature of quasi-contracts. *Id.* Implied-in-law contracts are also different from contracts implied-in-fact, so it is important to recognize this distinction when discussing "implied contracts." Jessica Nguyen, *A Preemptive Copyright Ghost Lurking in Breach of Contract Claims*, 16 CHAPMAN L. R. 437, 455 (2013).

[114] *See, e.g.*, Thompson v. Horowitz, 37 N.Y.S.3d 266, 268 (App. Div. 2016) (citing Bradkin v. Leverton, 257 N.E.2d 643, 645 (N.Y. 1970)).

[115] *See, e.g.*, Brault Graham, LLC v. L. Offs. of Peter G. Angelos, 211 Md. App. 638 (2013).

[116] Annemarie Bridy, *A Novel Theory of Implied Copyright License in Paparazzi Pics*, LAW360 (Aug. 6, 2019, 11:43 AM), https://www.law360.com/articles/1185445/a-novel-theory-of-implied-copyright-license-in-paparazzi-pics. The defendant in *XClusive-Lee* did raise the argument that a nonexclusive license should have been granted because the objective

the unique facts of the paparazzi-celebrity relationship could possibly give rise to a contract implied-in-law that gives a celebrity rights to a limited, noncommercial license.[117]

An implied-in-law contract would likely apply to a narrower scope of celebrity photographs than the doctrine of fair use. Creative contributions, especially those that add value (such as a pose or a smile), would likely give rise to a stronger claim for an implied-in-law contract due to the increased contribution of the subject, therefore making it more unfair for the photographer to profit off of their contributions.

It would be more difficult to argue for an implied-in-law contract that granted a license for use if there was little to no creative contribution from the celebrity, as in the case of a candid photo, as they would be contributing less value and also would not necessarily engage in the conduct necessary to create an implied-in-law contract. This approach could resolve some of the issues that would exist if joint authorship was given to subjects of photographs.[118] It has been suggested that where someone's creative contribution does not reach the level where joint authorship should be granted, that an unjust enrichment theory could give rise to an implied-in-law contract for more minor contributions.[119] While celebrities who pose for paparazzi photographs should not necessarily receive the rights to gain actual profit for whatever creative contribution they make to the photographs, it seems fair that an implied-in-law contract could be created to grant them rights to personal use for

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conduct of Hadid stopping and posing for the photograph, and because of the value that she added to the photograph. Memorandum of Law in Support of Defendant's Motion to Dismiss, *supra* note 51, at 10-11. Hadid argued that the only reason that the posed photograph (that was especially valuable) was because of the mutual actions of her and the photographer. *Id.* However, Hadid was not specifically arguing for an "implied-in-law" contract in her brief, because she relied on authority that argued for an implied license arising out of "objective conduct that would permit a reasonable person to conclude that an agreement had been reached." *Id.* (citing Joe Hand Promotions, Inc. v. Maupin, 2018 WL 2417840, at *5 (E.D.N.Y. May 25, 2018) (No. 2:15-cv-06355)). An implied-in-law contract does not require a meeting of the minds or the parties' assent. *See, e.g.*, Houston Med. Testing Servs., Inc. v. Mintzer, 417 S.W.3d 691 (Tex. App. 2013).

[117] *See* Bridy, *supra* note 116116.

[118] *See* Russ VerSteeg, *Intent, Originality, Creativity and Joint Authorship*, 68 BROOK. L. REV. 123, 164 (2002).

[119] *Id.*

the photograph that the paparazzi will gain a profit from as a result of the "contribution" of the celebrity.

This theory may also face preemption issues. Quasi-contract claims based in state law principles, such as implied-in-law contracts can be preempted when they assert rights available under copyright law.[120] However, a potential plaintiff arguing a claim under this theory could possibly escape the issue of preemption because as discussed in Part IV, the "contributions" made by the subject of a photograph are not independently copyrightable, and therefore no rights would be available under copyright law.[121] The theory of an implied-in-law contract, while novel, could be workable, but most likely only in a photograph where the celebrity made some sort of contribution.

C. Fair Use

A better solution would be allowing non-commercial use under the fair use doctrine. The Copyright Act allows "fair use" of a copyrighted work for purposes such as "criticism, comment, news reporting, teaching, scholarship, or research."[122] When enacting the Copyright Act, Congress expected that the fair use doctrine would evolve to deal with questions concerning copyright law and new technologies, which would align well with addressing this issue.[123] There are four factors that courts consider in their determination of whether use is a fair use:

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[120] RAYMOND T. NIMMER & JEFF C. DODD, MODERN LICENSING LAW § 13:25 (2019-2020 ed.).
[121] In the context of "idea submission," where a plaintiff sues under an unjust enrichment theory for the exploitation of their ideas (which do not meet the statutory requirements for copyright protection), this theory has generally been held to be preempted based on the fact that they are seeking an equivalent right to those described in the Copyright Act. *See* Arthur R. Miller, *Common Law Protection for Products of the Mind: An "Idea" Whose Time Has Come*, 119 HARV. L. REV. 703, 715 (2006). It is foreseeable that a court would evaluate the "contributions" of the subject of a photograph in a similar manner.
[122] 17 U.S.C. § 107 (2018).
[123] *See* Pamela Samuelson, *Fair Use for Computer Programs and Other Copyrightable Works in Digital Form: The Implications of* Sony, Galoob *and* Sega, 1 J. INTELL. PROP. L. 49, 116 (1993) (explaining how the fair use doctrine can be a flexible method for balancing competing copyright interests when confronted by unanticipated problems posed by new technologies).

1) The purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
2) The nature of the copyrighted work;
3) The amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
4) The effect of the use upon the potential market for or value of the copyrighted work.[124]

The legislative history of the Copyright Act emphasizes that the fair use doctrine must be implemented on a case-by-case basis; since the doctrine is "an equitable rule of reason, no generally applicable definition is possible."[125] Courts have emphasized this as well.[126] The text of § 107 indicates an openness to consideration of other factors, which would seem to include if the defendant's conduct was fair.[127] However, the four factors of fair use provide a useful starting point in the analysis of this issue.

1. Purpose and Character of the Use

The first fair use factor evaluates "the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes."[128] If a work is used commercially rather than for a nonprofit purpose, it is less likely that the use will qualify as fair.[129] The crux of the profit/nonprofit distinction is not whether the sole motive of the use is monetary gain, but whether the user will profit without "paying the customary price."[130] Another factor in this calculus is whether the work is "transformative," for example if it adds

[124] *Id.*
[125] *See* H.R. REP. NO. 94-1476, at 65 (1976).
[126] *See* Authors Guild, Inc. v. Google Inc., 954 F. Supp. 2d 282, 290 (S.D.N.Y. 2013), *aff'd sub nom.* Authors Guild v. Google, Inc., 804 F.3d 202 (2d Cir. 2015) ("The determination of fair use is 'an open-ended and context-sensitive inquiry' . . . . The four factors enumerated in the statute are non-exclusive and provide only 'general guidance.'"); Cambridge Univ. Press v. Patton, 769 F.3d 1232, 1260 (11th Cir. 2014) (stating that fair use is "not a mechanical determination" and that the factors cannot be treated as a "simple mathematical formula.").
[127] Samuelson, *supra* note 123, at 57; *see* 17 U.S.C. § 107.
[128] 17 U.S.C. § 107.
[129] *See* Harper & Row Publrs., Inc. v. Nation Enters., 471 U.S. 539, 562 (1985).
[130] *Id.*

something new, a further purpose, or different character.[131] Whether the work is transformative is not dispositive to the inquiry regarding the purpose and character of the use of the work, but the more transformative the work, the less significant are the other factors.[132]

In the case of simply reposting a photograph of oneself to an Instagram page, the work would likely not be considered transformative because it does not add anything, offer commentary, or change the essential character of the work. Therefore, the commercialization of the work becomes more relevant.[133] When a celebrity simply reposts a photograph, it would appear to be non-commercial in nature. After all, when the average person posts a picture of themselves on their Instagram page, they gain nothing more than the "likes" and comments collected from their followers. Similarly, it would appear when a celebrity posts a photograph of themselves, it would also be for the reason of engaging their followers, barring any explicit commercial use such as a sponsored post.

The plaintiff in *Xclusive-Lee* made a point regarding photographs that celebrities post of themselves—celebrities can use social media to maintain their personal brand.[134] However, this is not enough to tip the scales in favor of a finding of commercial use. In *Sega Enterprises Ltd. v. Accolade, Inc.*, the Second Circuit evaluated the commercial use factor of fair use where a company copied computer code from a competitor to study it for the purposes of producing a competing product.[135] The court found that any commercial "exploitation" was indirect or derivative and found the first factor in favor of the alleged infringer.[136]

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[131] Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 579 (1994).
[132] *Id.*
[133] *Id.*
[134] Plaintiff's Opposition and Accompanying Memorandum of Law to Defendant's Motion to Dismiss, *supra* note 53, at 2 ("Hadid maintains and supports her brand by keeping herself in the news by chronicling her exploits on social media, including Instagram.").
[135] 977 F.2d 1510, 1523 (9th Cir. 1992), as amended (Jan. 6, 1993).
[136] *Id.* The court also stated that they were "free to consider public benefit" resulting from a particular use. *Id.* While it may be a stretch to consider a small subset of the population having greater access to photographs taken of themselves a "public benefit," it is still a factor that could be considered.

Any alleged commerciality of a celebrity reposting a picture of themselves without any attempt to commercially exploit it for profit would be similarly indirect or derivative.[137] While Gigi Hadid reposting the picture of herself may have assisted her "personal brand" in some form or fashion, and she undoubtedly received attention from her followers for posting the photo, this does not translate into "commercial exploitation." This is even less of a commercial use than the defendant in *Sega Enterprises*, where the defendant was copying the code to further their own commercial enterprise of developing competing products. If there is no attempt for a celebrity to directly gain profit from posting a picture (*i.e.*, using the photo as part of a sponsored advertisement),[138] the first factor of fair use should weigh in their favor.

2. Nature of the Copyrighted Work

The second fair use factor considers "the nature of the copyrighted work."[139] Evaluating this second factor hinges on both whether a work is published and the degree of creativity it expresses.[140] Works that contain a greater degree of creativity, such as works of fiction, have a narrower permissible scope of fair use than works with a more factual

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[137] *See* Cambridge Univ. Press v. Patton, 769 F.3d 1232, 1263-67 (11th Cir. 2014) (discussing when use of a copyrighted work is considered commercial and stating that the lack of a meaningful enhancement in reputation weighs in favor of fair use). *But see* Soc'y Holy Transfiguration Monastery, Inc. v. Gregory, 689 F.3d 29, 61 (1st Cir. 2012) (holding that a defendant "profited" from his use of a copyrighted work because he would experience a gain of recognition within his community).

[138] *See* Suzanne Kapner & Sharon Terlep, *Online Influencers Tell You What to Buy, Advertisers Wonder Who's Listening*, WALL ST. J. (Oct. 20, 2019, 8:59 PM), https://www.wsj.com/articles/online-influencers-tell-you-what-to-buy-advertisers-wonder-whos-listening-11571594003 [https://perma.cc/4GAW-ZPVG] (discussing how celebrities and Instagram "influencers" can make large amounts of money from advertising products on their Instagram page).

[139] 17 U.S.C. § 107.

[140] 2 HOWARD B. ABRAMS & TYLER T. OCHOA, THE LAW OF COPYRIGHT § 15:52 (2019 ed.). This treatise has been considered authoritative by many courts regarding distinctions regarding the nature of the copyrighted work. *See* Blanch v. Koons, 467 F.3d 244, 256 (2d Cir. 2006) (quoting treatise); Cariou v. Prince, 714 F.3d 694, 709-10 (2d Cir. 2013) (quoting treatise in part); Estate of Smith v. Cash Money Recs., Inc., 253 F. Supp. 3d 737, 751 (S.D. N.Y. 2017) (quoting treatise); Davidson v. United States, 138 Fed. Cl. 159, 173 (2018) (quoting treatise in part).

or informational bent.[141] The scope of fair use is also narrower when a work is unpublished.[142]

In the case of reposted paparazzi photos, both of these considerations would weigh in favor of the celebrity reposting the photo. In the typical case of re-use of a photograph by a celebrity, such as in *Xclusive-Lee*, the photograph has already been published, and the subject reuses it after they encounter it.[143] Works that have already been published, and thus where the "first appearance" of the artist's expression has already occurred, are more likely to qualify as fair use.[144]

Photos that are primarily "factual works," rather than those that emphasize creative artistic choices by the photographer, such as lighting, framing, or other artistic choices, also are subject to a wider scope of permissible fair use.[145] Even though paparazzi photographs may involve some degree of creative choices by the photographer, photographs taken by paparazzi on the street, and even where a model was posed by the photographer, have been repeatedly held to be primarily factual works for the purposes of fair use.[146]

Another factor that should be considered in evaluating the nature of the copyrighted work are the contributions of the subject. As discussed above, the "creative contributions" of a subject should not give rise to a

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[141] ABRAMS & OCHOA, *supra* note 140.
[142] *Id.*
[143] *See Xclusive-Lee*, *supra* note 44. In the case discussed above, Hadid re-posted the photograph of herself after she saw it while browsing Twitter. *Id.*
[144] Kelly v. Arriba Soft Corp., 336 F.3d 811, 820 (9th Cir. 2003) (stating that the fact that an image had previously appeared on the internet before it was re-used by the defendant weighed in favor of fair use by the defendant).
[145] *See* Katz v. Google Inc., 802 F.3d 1178, 1183 (11th Cir. 2015). *Katz* stated that "photojournalistic timing" is not enough to make the creative elements of a photo dominate over its plainly factual elements. *Id.*
[146] *See id; see also* Fitzgerald v. CBS Broad., Inc., 491 F. Supp. 2d 177, 188 (D. Mass. 2007) (holding that a photograph of a mobster leaving a police station taken by a freelance journalist was primarily a factual work even though the photographer made creative choices regarding the framing, angle, timing, lighting, etc.). Even photographs where a photographer exercised control over the lighting and pose of a model have been held to be primarily factual works, as they were not artistic representations that were designed to express the photographers "ideas, emotions, or feelings," but rather were designed to highlight the talents of a particular model. Nunez v. Caribbean Int'l News Corp., 235 F.3d 18, 23 (1st Cir. 2000).

claim of joint authorship, but they could play a role in evaluating the degree of creativity contributed by the photographer, and whether the work should qualify as a factual or artistic work.[147] After all, in many typical paparazzi photographs, such as the photograph of Gigi Hadid in *Xclusive-Lee*, the subject chose the pose, the outfit, and the emotions she chose to express in the photograph.[148] In a photograph such as this one, she contributed much of the "artistic value" of the photograph, as a photograph of a model posing and smiling would have a distinctly different character than a more candid photograph of her walking by while ignoring the photographer. A photograph where a celebrity poses and smiles also adds monetary value—pictures of a celebrity smiling, as opposed to displaying a blank expression, are worth considerably more.[149] Because reposted photographs of celebrities taken by paparazzi have already been published, and because they would be considered a factual rather than creative work, the second factor of fair use weighs in favor of celebrities who repost paparazzi photographs.[150]

3. Amount and Substantiality of the Portion Used

The third factor in the fair use test is the "amount and substantiality of the portion used."[151] Generally, the larger portion of the work used, the more the factor weighs in favor of the original copyright holder.[152] In the case of reposted paparazzi photos, this factor of the fair use test would likely weigh in favor of the original photographer, especially if the entire photograph was reposted, but there are also mitigating arguments from the point of the re-poster. However, even copying the

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[147] *See* Part IV, *supra*.
[148] *See* Memorandum of Law in Support of Defendant's Motion to Dismiss, *supra* note 51, at 10 ("[T]he second factor strongly favors Ms. Hadid here because Ms. Hadid posed for the camera and thus herself contributed many of the elements that the copyright law seeks to protect.").
[149] *See* Daniel Engber, *How Do the Paparazzi Sell Their Pics*, SLATE (June 3, 2005, 6:13 PM), https://slate.com/news-and-politics/2005/06/how-do-the-paparazzi-sell-their-pictures.html [https://perma.cc/2VQ6-K6G9].
[150] *See supra* notes 144-146 and accompanying text.
[151] 17 U.S.C. § 107.
[152] Infinity Broad. Corp. v. Kirkwood, 150 F.3d 104, 109 (2d Cir. 1998).

entire portion of a work can qualify as fair use.[153] The inquiry into the third factor also depends on how much is necessary to copy for the purpose of the use of the work.[154]

One commentator has argued that this third factor should be discounted in the context of works of visual art, such as photographs.[155] Due to the nature of a visual work, such as a photograph, use of the work requires a greater "amount and substantiality" because images cannot be summarized, paraphrased, described, or quoted from.[156] Therefore, Stephen Weil argues, the rest of the factors in the fair use test should be granted greater weight in the analysis of photographs.[157]

In the hypothetical case of a celebrity reposting an entire paparazzi photograph of themselves, this factor would likely weigh in favor of the photographer, as the entirety of the work was used. However, if less than the complete photograph is posted, such as a cropped version, this may shift the calculus somewhat, as changes to the work that affect the original artistic elements of the work, such as framing or other elements of the photograph that were an artistic decision by the photographer, can shift this factor in favor of the secondary user of a work.[158]

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[153] *Caribbean Int'l. News Corp.*, 235 F.3d at 24; Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 449 (1984) (holding that a recording of the entire part of a television program did not have the effect of "militating against a finding of fair use.").

[154] Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 586-87 (1994) (holding that the third factor weighed in favor of the defendant even though they had copied a large portion of a song for the purpose of parody).

[155] Stephen E. Weil, *Fair Use and the Visual Arts, or Please Leave Some Room for Robin Hood*, 62 OHIO ST. L.J. 835, 840 (2001).

[156] *Id.*

[157] *Id.*

[158] Blanch v. Koons, 467 F.3d 244, 258 (2d Cir. 2006) (holding that a copied portion of an image that did not reflect "key creative decisions" by the original author tipped the third fair use factor in favor of the defendant). In *Xclusive-Lee*, Hadid also made an argument based on the fact that she had cropped the image at issue before she posted it to Instagram. *See* Memorandum of Law in Support of Defendant's Motion to Dismiss, *supra* note 51, at 10-11. She argued that she had edited the photograph to emphasize her "creative contributions," such as her pose, and deemphasize the photographer's creative choices of framing the photograph. *Id.* at 11. Modifications to an original photograph that transform it substantially by adding some sort of value, new insight, commentary on the original work weigh in favor of fair use for the secondary user of the photograph. *See* Cariou v. Prince, 714 F.3d 694, 710-12 (2d Cir. 2013) (discussing how this factor weighed in favor of an artist who had copied entire

4. Effect of the Use upon the Potential Market or Value of the Work

The final statutory fair use factor is "the effect of the use upon the potential market for or value of the copyrighted work."[159] This factor is considered to be "undoubtedly the single most important element of fair use."[160] This factor requires courts to consider the both the extent of harm to the market caused by the actions of the infringer, but also whether the conduct of the defendant could result in an adverse effect on the potential market for the original.[161] It is necessary that a plaintiff show by a preponderance of the evidence that some meaningful likelihood of future harm exists.[162]

The fourth factor also ties into the purpose of the use. If a use of a work is commercial, the likelihood of harmed is presumed. If the use is for a noncommercial purpose, the likelihood of harm must be demonstrated by the plaintiff by a preponderance of the evidence.[163] This inquiry "focuses on whether the copy brings to the marketplace a competing substitute for the original, or its derivative, so as to deprive the rights holder of significant revenues."[164] The fourth factor also analyzes the

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photographs from a photographer and made significant changes that transformed them into something new and different).

[159] 17 U.S.C. § 107(4).

[160] Harper & Row Publrs., Inc. v. Nation Enters., 471 U.S. 539, 562 (1985). This statement has been one of the most repeated in judicial evaluation of the fair use factors. *See* New Era Publ'ns Intern., ApS v. Carol Pub. Group, 904 F.2d 152, 159 (2d Cir. 1990); Cable/Home Commc'n Corp. v. Network Prods, Inc., 902 F.2d 829, 845 (11th Cir. 1990); Narell v. Freeman, 872 F.2d 907, 914 (9th Cir. 1989); United Tel. Co. of Missouri v. Johnson Pub. Co., Inc., 855 F.2d 604, 610 (8th Cir. 1988); Hustler Mag. Inc. v. Moral Majority Inc., 796 F.2d 1148, 1155 (9th Cir. 1986).

[161] Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 590 (1994).

[162] Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 451 (1984).

[163] *Id.*

[164] Authors Guild v. Google, Inc., 804 F.3d 202, 223 (2d Cir. 2015). The court in *Authors Guild* emphasized the connection between the first and fourth factors—the more the copying is done to achieve a purpose that differs from the original purpose, the less likely it is that the copy serves as a substitute for the original. *Id.* (citing Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 591 (1994)). Courts have also refused to recognize lost possible licensing fees from the challenged use by the defendant in their consideration of the fourth factor, because the crucial fourth factor would never be in favor of the secondary user if this was the case. Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1125 (1990). Because

market harm that would result from similar conduct to the alleged infringement.[165]

To analyze if potential harm to the market could result from a celebrity reposting a paparazzi photo, it is first necessary to understand how the market for paparazzi photos functions. After a paparazzo snaps a photo, most turn the picture over to a photo agency.[166] These photo agencies then send the pictures in digital form to publications around the world, with the goal of selling the picture within 24 hours.[167] These publications bid against each other for the rights to the photograph, and typically buy exclusive rights to print the photo for a few months.[168]

In the fast-paced market for paparazzi photos, the reposting of an already-published photograph for personal use by a celebrity would not have a substantial effect on the market. The photographs are licensed quickly, and the licenses are typically exclusive for a period of months.[169] By the time the subject of the photograph has the time to encounter the photograph themselves through publication by the licensee of the photograph and repost it to their personal page, the original photographer and agency has likely already made the money they will make from that particular photograph through the sale of the exclusive license.[170] Therefore, there is not a possibility that the reposting of the photograph will deprive the original purveyor of the

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of the importance of this fourth factor, market impairment should be "reasonably substantial" to turn the fourth factor. *See id.* at 1124-25.

[165] *Campbell*, 510 U.S. at 590.

[166] Engber, *supra* note 149. Agencies manage the majority of photos, but some paparazzi act as their own agents. *Id.* Sometimes celebrity magazines and tabloids will also commission agencies to get certain pictures, such as a picture of a celebrity exiting a hospital with her new baby. *Id.*

[167] *Id.* Sometimes these pictures are sent to the agencies in low resolution or with a watermark to discourage unauthorized use of the photograph. *Id.*

[168] *Id.*

[169] This fast-paced market that exclusively consists of news organizations raises the question of whether a celebrity could buy an exclusive license to the photograph, similar to how a magazine does, even if they desired to do so. Since the licenses for paparazzi photographs are typically exclusive as well, it seems that the subject of the photograph would effectively be barred from obtaining rights to a photograph in any manner.

[170] It could be possible that fair use of a photograph could damage a photographer's potential licensing market to magazines if the subject of the photograph were free to repost it, affecting the magazine's exclusive ability to publish the photograph.

photograph of "significant revenues," and cause harm by not paying a licensing fee, as a license would likely not be available due to exclusivity, and there would probably not be a future market for the photograph given the ephemeral nature of the paparazzi news cycle.

The re-poster also does not compete in the same marketplace as the photographers and agencies. Reposting a photograph to one's personal Instagram page does not compete with the market for licensing photographs to magazines, because by the time the photograph reaches the point it is posted to the internet and can be reposted, the photograph will likely already have been exclusively licensed to a magazine.[171] Granting a celebrity the right to post a photograph of themselves does not eliminate the market for future licenses, as it would be a narrow right that is constrained to the particular subject of the photo; potential future licensees would not have a similar right to use the photograph and would have to pay customary license fees. Because the reposting of a paparazzi photograph by a celebrity would not have a substantial impact on the market for the original work, this factor of the fair use analysis would weigh in favor of the celebrity.[172]

The statutory factors of fair use overall weigh in favor of celebrities having the right to repost a photograph taken of themselves. However, in the fair use analysis, courts can also evaluate other relevant factors.

5. Other Relevant Factors

The doctrine of fair use is an "equitable rule of reason," which allows consideration of other relevant factors to the fair use analysis in addition to the enumerated statutory factors.[173] The four statutory factors set out in 17 U.S.C. § 107 are not meant to be exclusive.[174] As discussed above

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[171] *See id.* However, the licensee could potentially make an argument for damages, as it could affect the value of their license of the work. *See* Harper & Row Publrs., Inc. v. Nation Enters., 471 U.S. 539, 567-69 (discussing how publication of excerpts of a copyrighted work, which was in this case unpublished, could potentially affect the market share for these unpublished excerpts).
[172] *See* Engber, *supra* note 149 166(discussing the fast-paced market for paparazzi photographs).
[173] *See* H.R. REP. NO. 94-1476, at 65 (1976).
[174] *Harper & Row Publrs.*, 471 U.S. at 560.

in Part IV, it is unfair and inequitable for a third party to profit from a paparazzi photograph that derives its value from the solely from the subject's presence without the subject of the photograph having limited, noncommercial rights to the personal use of that photograph. Because of the broad scope of fair use and Congress's desire for it to be an "equitable rule of reason," this unique and currently unbalanced relationship between celebrities and paparazzi photographers should be taken into account, and it supports granting celebrities the right to use photographs of themselves in a limited, noncommercial context.

Fair use is likely the most viable solution to grant celebrities rights to repost photographs of themselves. As discussed above, the statutory factors likely support a case for fair use by subjects of paparazzi photos, and this solution would comport with Congress's desire in enacting the fair use rule—to prevent unfairness in copyright law.

VI. Conclusion

A celebrity should possess legal rights to use a paparazzi image in a limited, non-commercial context. It is unfair for the subject of a commercially valuable photograph, who provides the entirety of that commercial value, to have no ability to enjoy personal use of that photograph, especially considering the exploitative nature of paparazzi photography. While all of the lawsuits filed against celebrities for reuse of photographs of themselves so far have been settled out of court or dismissed on grounds unrelated to the actual use of the photograph, such as a failure to register the copyright of the photo before filing the lawsuit, the issue is ripe for actual litigation of the facts surrounding the use of the photographs.

Fortunately, there are doctrines that celebrities could potentially rely on to defend their potential use of the photographs. Doctrines that emphasize equity, such as fair use or a contract implied in law, can and should be used for celebrities to obtain these rights.